THE BKCG
BULLETIN
Summer 2015 Edition

BKCG
BURKHALTER KESSLER CLEMENT & GEORGE LLP

ZERO PROOF WHISKEY: JUDGE BOUNCES CLAIMS OF EMPLOYEE FIRED FOR IMPROPER JIM BEAM REFUND

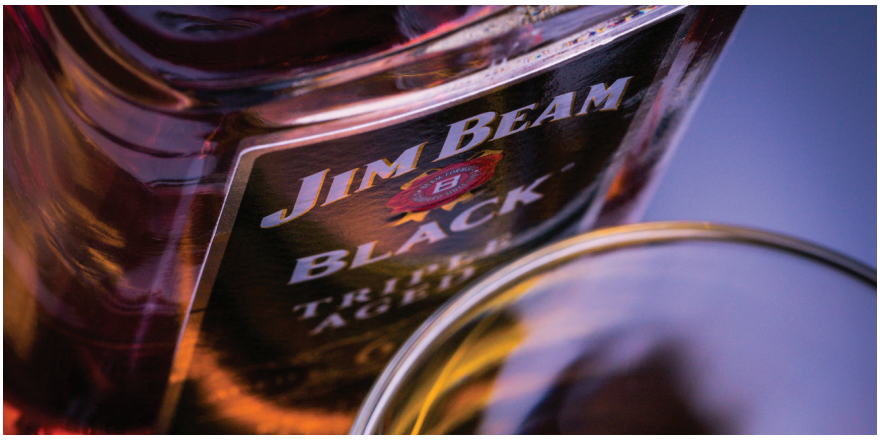
BKCG Scores Big Win Before Trial to End Case

In what was recently ranked as the Daily Journal's weekly Top Defense Verdict, BKCG lawyers were able to secure a complete summary judgment for their client Ralphs Grocery Company and against its former employee, Diane Vincent, ending her bid for millions of dollars before trial.

Since 2004, Vincent was a store Co-Manager, a salaried management position, second in the store only to the Store Manager. In early 2012, Vincent walked up to one of the cashiers at her store in the San Gabriel Valley with a bottle of Jim Beam whiskey and told the cashier to give her a refund for it.

As Vincent would later explain in her lawsuit, Vincent's boyfriend allegedly bought the Jim Beam instead of Jack Daniels and Vincent wanted to return it - without a receipt. Ralphs proved, however, that Vincent violated several written policies during this return. Ralphs showed that Vincent instructed her subordinate to ring up the return without the receipt, for cash, and for a higher amount than the shelf price—all no-no's at Ralphs. Indeed, when the cashier scanned the bottle, it came up as $17.99, but according to documents submitted to court, Vincent told the cashier, "No, no, sister, I got it for $19.99."

When Ralphs' loss prevention department later investigated the incident, it determined that Vincent completed the transaction herself, and took the $19.99 in cash from the register. During the investigation, Vincent admitted the key facts of the transaction



as described by the cashier, and later produced a receipt showing the whiskey was purchased for only $14.99. The very same day that Vincent was interviewed, she went out on medical leave and never returned to work. With the investigation completed, Ralphs' Human Resources vice president determined that termination was appropriate under the circumstances, and Vincent was notified.

Despite a seemingly clear cut termination, Diane Vincent sued Ralphs in 2013 alleging 12 causes of action ranging from discrimination to wrongful termination to labor code violations for failure to pay wages. In what could be described as an effort to muddy the waters of this otherwise mundane employment case, Vincent peppered her complaint with salacious allegations of age discrimination (she was 48 at the time), disability discrimination, and perhaps most notable, reverse sexual orientation discrimination—claiming she was terminated because she was *not* gay. Ultimately, the Court found that Vincent had no evidence to support any of her accusations.

(continued on page 8)

CROWDFUND ME: AVOIDING THE PITFALLS ASSOCIATED WITH ONLINE CROWDFUNDING CAMPAIGNS

Using internet crowdfunding as an alternative mechanism to raise capital for both startups and existing businesses has grown at an exponential rate in the last several years. There are now hundreds of websites dedicated to facilitating these crowdfunding campaigns, the best known of which are Kickstarter.com and Indiegogo.com.

One of the most notable crowdfunding success stories is the Irvine-based company, Oculus VR, Inc., which was able to turn a crowdfunded campaign to create a virtual reality headset into an acquisition by Facebook, Inc. reportedly worth nearly $2 billion.

Although crowdfunding certainly can be lucrative, like many emerging industries, the law has not quite caught up to much of it, there is a substantial amount of legal gray area, and it ultimately could be subject to further legislation or administrative regulation in the future.

Not every crowdfunding campaign is a success story either, and in the worst case, it can expose you and your business to civil or administrative action.

For example, on June 10, 2015, the FTC settled a federal lawsuit it filed against a crowdfunding project creator who agreed to a stipulated judgment against him (for more information on this, visit https://www.ftc.gov/news-events/press-releases/2015/06/crowdfunding-project-creator-settles-ftc-charges-deception). This was the first major FTC action against a creator of a failed crowdfunding campaign, and it creates many implications for private litigation with regard to crowdfunding projects.

Thus, while crowdfunding can be a cheap and fast way of raising capital, there are both legal and tax implications you should take into consideration before raising capital through crowdfunding websites.

(continued on page 2)

In This Issue

CROWDFUND ME: AVOIDING THE PITFALLS ASSOCIATED WITH ONLINE CROWDFUNDING CAMPAIGNS (continued from page 1)

There Are Tax Implications

As explained in further detail in the companion article (on page 3) written by CPA Aslan Abregov of Abregov Parrino, LLP, a friend of the firm and a highly respected accountant in Orange County, there are tax implications associated with any crowdfunding campaign.

While BKCG does not specialize in tax law and does not provide tax advice, it is important to know that the money generated from crowdfunding campaigns carries tax implications with it.

You should consult with a qualified CPA or tax attorney if you have any questions about those tax implications, because it can affect your financial projections and estimated capital requirements for your crowdfunding campaign.

Business Venture Crowdfunding Campaigns

Many crowdfunding campaigns typically operate based on the following model: A campaign creator posts an idea for a particular business venture through a crowdfunding website, and then offers a series of "perks" in the form of goods or services in exchange for donations from "backers" to the campaign, along with expected fulfillment dates for these perks. Oftentimes, these perks come in the form of early access to the product or service that is the subject of the business venture.

Where many business venture crowdfunding campaigns go wrong is that the money received from backers is not actually dedicated to the campaign. In fact, the FTC has already taken the position that using campaign funds for personal expenses or to fund a different project constitutes "unfair or deceptive practices" under the FTC Act in the *FTC v. Chevalier* case described above.

The FTC's position indicates that similar state unfair competition and consumer laws, such as California's Business and Professions Code Section 17200, or even potentially California's Consumer Legal Remedies Act can also apply to crowdfunding campaigns. While the FTC might not pursue the creators of every crowdfunding campaign that fails, a failed crowdfunding campaign can still put you at risk of being sued by private plaintiffs. This could also come in the form of a class action lawsuit filed on behalf of dissatisfied backers if your business venture crowdfunding campaign does not go as planned.

To this point, the FTC provided the following recommendations for creators of crowdfunding campaigns as part of its press release regarding *Chevalier*, which echo the recommendations of many crowdfunding websites:

1) Keep Your Promises When Crowdfunding. If you promise rewards, give them. If you promise refunds, provide them.

2) Use the Money Raised from Crowdfunding Only for the Purpose Represented. If you collect money for a specified project, like creating a board game, use the money only for that purpose. Do not use it for personal purposes or to start another project.

In addition to the FTC's recommendations, BKCG also has the following additional recommendations for business venture crowdfunding campaigns:

Plan Ahead. Have a comprehensive business plan in place for your business venture before launching your crowdfunding campaign. Logistical issues can often interfere with your ability to deliver on your campaign's promises, and many times these issues can be avoided, or at least anticipated, by planning ahead of time. While this is more of a practical consideration than a legal consideration, careful planning can help ensure that you can keep your promises to backers, which in turn helps minimize the risk of legal exposure to you or your business.

Determine Whether Your Business Venture Contemplates IP Rights of Third Parties. The bulk of the court decisions involving crowdfunding campaigns in jurisdictions throughout the United States have been patent, copyright, trademark, or other intellectual property-related lawsuits seeking to enjoin a crowdfunding campaign that infringes upon the intellectual property rights of others. For example, if your project idea is to crowdfund a live-action independent movie about the life and times of Mickey Mouse, you might be hearing from the lawyers for The Walt Disney Company. Similarly, a crowdfunding campaign to build what you think is a new invention might incorporate, in whole or in part, the patented invention of someone else. Thus, it is important to investigate whether your business venture uses the intellectual property of others before moving forward with your crowdfunding campaign, and whether you have obtained a license to use that intellectual property if it does.

Communicate Often and Honestly. Do not make representations about your campaign that you know are untrue, or could potentially be misleading. Make promises you know you can keep, set realistic goals, be candid with your backers, and provide them with timely updates on the progress of the campaign to ensure they know that your time and resources are being devoted to completing it. If you have a setback, let your backers know, but take care to do so without naming and/or blaming third parties (which could potentially expose you to liability for defamation if any of these third parties take issue with your statements to your backers).

Meticulously Account. As demonstrated by the *FTC v. Chevalier* case, using campaign funds for any purpose other than completing the campaign can be considered an unfair business practice. This means that you should meticulously account for the use of these funds to demonstrate that you have been using them only in furtherance of the campaign should something go wrong. It may even be prudent to set up a separate bank account specifically for your project funds, since comingling your campaign funds with other business funds will make it difficult to demonstrate that you have been treating the campaign funds properly, and even could give rise to an inference that you misused the campaign funds.

While these are some of the significant considerations that are germane to most business venture crowdfunding campaigns, there can be myriad additional legal issues that can vary from campaign-to-campaign. Therefore, BKCG recommends consulting with qualified tax and legal professionals if you have any questions regarding your anticipated or existing business venture crowdfunding campaign.

(continued on page 3)

CROWDFUND ME: AVOIDING THE PITFALLS ASSOCIATED WITH ONLINE CROWDFUNDING CAMPAIGNS (continued from page 2)

Capital Investment Crowdfunding Campaigns

Instead of funding a particular business venture, some crowdfunding campaigns actually offer equity in exchange for money from backers. An example of this would be selling a 1% ownership interest in a business or product to an investor in exchange for $25,000. However, these capital investment crowdfunding campaigns are more complicated from a legal and administrative standpoint, since Federal and State securities laws start coming into play with these campaigns.

There are already a number of exemptions to the registration requirements of Federal and State securities laws. In addition to these exemptions, the 2012 JOBS Act created an additional exemption under *15 U.S.C. § 77(d)(6)*. This new exemption was designed to address crowdfunding campaigns and to permit equity crowdfunding with non-accredited investors in certain circumstances. However, this new exemption can be tricky to understand, since it:

1) Limits the total amount of the offering during any 12-month period;
2) Limits the amounts each investor can contribute;
3) Requires you to hire a broker registered with the SEC or use a funding portal registered with the SEC; and
4) Requires you to file a detailed disclosure statement with the SEC and distribute this disclosure statement to any potential investor, as well as the brokers or the funding portal.

Given the legislative and regulatory infrastructure underlying this "crowdfunding exemption," BKCG recommends that anyone seeking to launch a capital investment crowdfunding campaign for the first time seek legal advice beforehand.

Charitable or "Fund Me" Crowdfunding Campaigns

Finally, some crowdfunding campaigns are not associated with a business venture or capital investment at all, and are for purposes of raising money for a charity or a person's individual expenses.

While these kinds of campaigns are not associated with the development or funding of a business, you should still be guided by some of the same considerations applicable to business venture crowdfunding campaigns if you are considering launching such a campaign.

In particular, make sure to accurately represent the nature and purpose of your campaign, and use the donations you receive only for their intended purpose.

There Is Still Legal Gray Area

Despite the *FTC v. Chevalier* case, this is still an emerging area of law where the obligations, rights, and potential liabilities of crowdfunding campaign creators are not always well-defined. Nevertheless, BKCG is continuing to keep its eye on this area of law as it develops, and competent legal and tax advisors can help you avoid the known potential pitfalls associated with launching a crowdfunding campaign.

Please contact Eric Hardeman at (949) 975-7500 or ehardeman@bkcglaw.com if you have questions about any issue discussed in this article.

Guest Article: CROWDFUNDING By Oz Abregov, CPA, Abregov Parrino, LLP

Crowdfunding is the latest way to raise money through websites such as Kickstarter, Indiegogo, PROfounders and other such websites. Although the IRS has not published specific guidance on the tax consequences of receiving money through these sites, tax consequences do exist.
Funds raised through these websites are either income, a capital investment or a gift.

Funding a Business Venture

If you are funding a business venture, the taxpayer must report the contribution as income, subtracting ordinary and necessary business expenses. For example, if the project needs $25,000 to design and produce a new software game, the amount collected is revenue. But if the Company's expenses were $7,000, the net taxable income would be $18,000.

Another example, if a taxpayer receives funding of $10,000 in one year and spends $10,000 on their project in the same tax year, then their expenses could fully offset their funding for federal income tax purposes. If a taxpayer received funding in one year and spends money on their project in a later year, you need to be aware that a cash basis taxpayer could have a sizeable tax liability for the year of funding. Before raising any funds, you would want to determine if the taxpayer is able to use the accrual method of accounting.

Funding a Capital Investment

If the $25,000 is in exchange for a 1% interest in the product or entity, it is a capital investment. In most cases, the contribution may be for a small equity interest. In that case it is similar to venture capital, just on a smaller scale. If the business is not incorporated or is not an otherwise organized legal entity, the business is now a partnership and requiring the filing of a partnership tax return. If the contribution is for an equity interest, there is no taxable transaction until the equity interest is sold.

Funding a Charitable Event

Many crowdfunding projects are designed to raise money to pay for an individual's medical, funeral or family expenses. For the donor, the contribution is a nondeductible gift (unless the contribution is to an IRC§501(c) (3) organization). The gift would be subject to gift tax if it exceeded $14,000 annually, requiring the filing of a Gift Tax Return for the donor. If the contribution is subject to the gift tax, it would be deemed not to be income to the recipient.

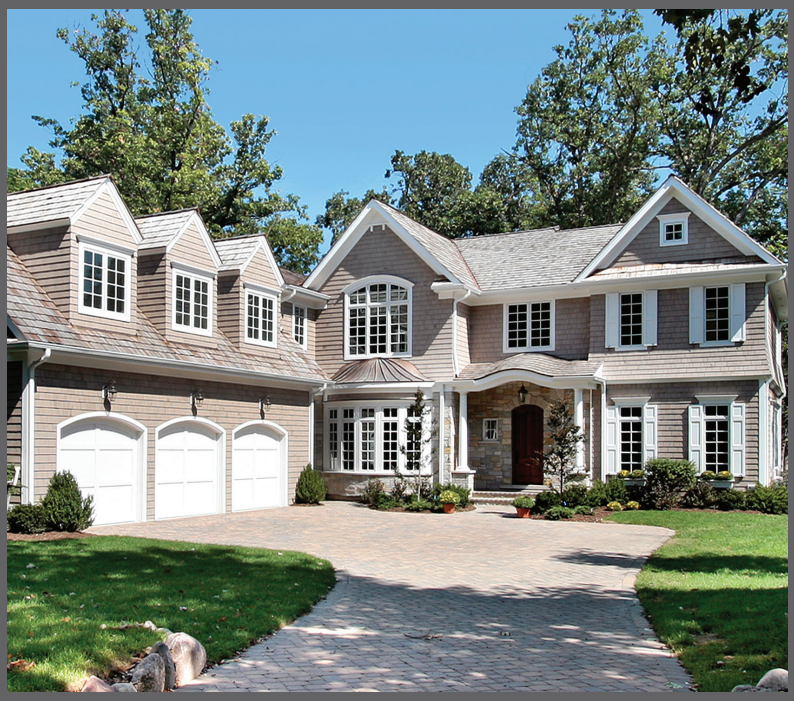
No matter what you are raising funds for, business, capital investment or charitable, you should always consult your tax advisor first to avoid any surprise tax consequences.

The Power of a Properly Recorded Lis Pendens in a Fraudulent Transfer Action

In the recent case of *Mira Overseas Consulting Ltd. v. Muse Family Enterprises, Ltd. et al.*, the California Court of Appeal affirmed that a judgment lien in favor of a fraudulent transfer claimant, relates back to the date in which the claimant first records a lis pendens against any real property at issue in a fraudulent transfer claim. Thus, a proper lis pendens takes priority over any subsequent judgment liens recorded against the real property.

In its most basic terms, a fraudulent transfer is an attempt by a debtor to avoid debt or potential debt by transferring money to another person or company. A creditor can bring a civil claim for fraudulent transfer against the debtor and any transferees of the property at issue. A transfer is considered "fraudulent" if made with the actual intent to hinder, delay or defraud a creditor. See Civil Code § 3439 et seq.
A "lis pendens" or "notice of pendency of action" should be recorded by the claimant against the real property at issue in any action that affects title to the real property or right to possession of the real property. Per its name, the notice of pendency of action ("lis pendens") provides notice of the pending court action to any subsequent purchasers or encumbrancers of the real property.

Defendant Muse Family Enterprises, Ltd. ("Muse") made various loans to BTM Funding, Inc. ("BTM"), a company wholly owned by David T. Smith. In 2008, Smith used BTM to purchase a $10 million home in Pacific Palisades. Smith purchased the property in BTM's name in order to hide the real property from his estranged wife, with whom he was embroiled in contentious divorce proceedings at the time.



In November 2008, Smith, who had since remarried, deeded the home to himself from BTM. On the same day, Smith quitclaimed the property to his new wife, who then quitclaimed the property to her revocable living trust. The quitclaim deeds were not recorded until 2009. Notably, the transfer of the property out of BTM's name rendered BTM insolvent, creating a legal presumption that the property transfer was, indeed, made with the intent to hinder, delay or defraud BTM's creditors.

Although Smith's former wife claimed that Smith hid the property during their divorce proceedings, Smith settled the claim by transferring to her Mira Overseas Consulting Ltd., which was owned by Smith.

In September 2010, Muse filed suit against BTM, Smith, his new wife and her trust (collectively, the "BTM Parties") in Los Angeles. Muse brought claims for breach of contract based upon unpaid loans, and fraud based upon the 2008-2009 transfers of the Pacific Palisades property. Muse also recorded a lis pendens against the property in 2010 in conjunction with the action. A jury found in favor of Muse in January 2013 and awarded over $21 million in damages to Muse, and nullified the property transfers reverting title in the property back to BTM. The judgment was recorded in Los Angeles County in February 2013.

During Muse's Los Angeles trial, Mira (which was now owned by Smith's ex-wife) also sued the BTM parties in Santa Monica in 2011, based upon an unpaid loan from Mira to BTM, and the fraudulent transfer of the property out of BTM's name. The action resulted in a written agreement between the parties and a June 2011 stipulated judgment in favor of Mira. Mira recorded the judgment in Los Angeles County in June 2011 in order to encumber the Pacific Palisades property.

Upon learning of Muse's action in Los Angeles, Mira sued Muse and the BTM Parties in early 2012 seeking a declaration that Mira's 2011 judgment lien was superior to any lien obtained by Muse in its pending action. Muse cross-complained against Mira claiming that its anticipated judgment lien (that it eventually secured in 2013) would relate back to the date of its 2010 lis pendens, thus taking priority over Mira's 2011 judgment lien. The trial found in favor of Mira affirming the priority of its 2011 lien over that of Muse.

In reversing the trial court's judgment, the Court of Appeal found that "[b]ecause a lis pendens provides constructive notice of the litigation, 'any judgment later obtained in the action relates back to the filing of the lis pendens.'... The rights and interest of the claimant in the property, as ultimately determined in the pending noticed action, shall relate back to the date of the recording of the notice." In so holding, the Court of Appeal relied upon an earlier California Supreme Court case which expressly held a fraudulent transfer claim affects title to or the right to possession of real property, such that the recording of a lis pendens is proper in such an action.

While the facts in this case are somewhat convoluted and salacious (Smith later re-married his estranged wife), this case illustrates the power and effect of a properly recorded lis pendens, especially where the real property is not only valuable (in this case it was also the former home of Kobe Bryant), but also the only likely source of recovery to the claimant or claimants.

Please contact Amber M. Sanchez at (949) 975-7500 or asanchez@bkcglaw.com if you have questions about any issue discussed in this article.

Court of Appeal Restricts PAGA Plaintiff's Discovery Rights

In 2004, California enacted the Private Attorney General Act ("PAGA"), a law which allows a private citizen to pursue civil penalties on behalf of the State of California Labor and Workforce Development Agency ("LWDA") and gives a private citizen the right to pursue fines that would normally only be available to the State of California. As such, it is truly allowing a private citizen to act as an attorney general and lets the employee seek civil penalties not only for violations that he personally suffered but also for violations of the rights of "other current or former employees."

Entrepreneurial plaintiffs' employment law firms have seized upon the ability to seek damages for potential violations of other employees to demand that employers turn over contact information for all of their employees, including employees working at different locations. A new opinion from the California Court of Appeal, however, curtails these improper fishing expeditions by holding that PAGA plaintiffs do not have an automatic right to such discovery and, instead, must earn access to the contact information by proving that he or she actually has a group-wide claim.

In *Williams v. Superior Court, 2015 DJ-DAR 5266* (May 15, 2015), an employee of a Marshalls department store sought contact information for every employee who worked at any of Marshalls's 129 California retail stores. In a decision upheld by the Court of Appeal, the trial court ruled that the plaintiff was not entitled to contact information for employees at stores other than the one where he worked unless and until he first established that he had a valid Labor Code claim and that the employer actually had common state-wide practices and policies.

The Court's ruling is significant for California employers for several reasons. First, it provides employers with much-needed ammunition to contest a demand for far-reaching contact information based only on speculation regarding statewide wrongdoing. Second, it incorporates federal law imposing an actual burden on plaintiffs (and their lawyers) to satisfy certain elements of a class action lawsuit to be entitled to the contact information. And third, it suggests that courts should invoke a three-stage analysis to class action and representative proceedings in which the plaintiff would have to jump through several procedural and substantive hoops before pursuing such claims. This three-stage analysis invariably would make the pursuit of such claims more challenging for plaintiffs, and may discourage some plaintiffs' attorneys who viewed the PAGA statute as an easy way to apply settlement pressure on a defendant employer.

Please contact Michael Oberbeck at (949) 975-7500 or at moberbeck@bkcglaw.com if you have questions about any issue discussed in this article.

What You Never Thought to Ask About Arbitration Clauses May Come Back to Bite You

As most business people now know, arbitration clauses, calling for business disputes to be resolved by a private judge through a private dispute resolution service, not by litigation, are increasingly common. Indeed, some companies now insist on including them in every contract they are a party to.

While the pros and cons of arbitration are much debated, what is *not* in serious dispute, however, is that arbitration clauses are often the least negotiated part of a contract: for the simple reason that many people do not even realize that arbitration clauses can be negotiated. In fact, they can be custom-drafted to fit their interests and protection needs and goals, like any other part of a contract.

The purpose of this article is not to weigh the merits of arbitration versus litigation, but instead to discuss five of the most important matters that should be addressed or considered when a contractual arbitration clause is being drafted.

1. Who will the arbitrator be and where will the arbitration take place? Unbeknownst to many people, the American Arbitration Association, often referred to as AAA or "Triple A" is not the only game in town when it comes to private commercial dispute resolution services. Many other highly competent and reputable local, regional and national dispute resolution services exist, such as JAMS and Judicate West. Based on our own arbitration experiences, BKCG actually greatly prefers both of the latter services to AAA. Furthermore, if the contracting parties are in geographically disparate parts of the country, such as California and Texas, it is quite common to provide for arbitration in a neutral location, such as Chicago or Denver, to ensure that neither side has an unfair "home field" advantage.

2. Is confidentiality an important issue? If so, the arbitration clause can be drafted to provide that the arbitration itself is entirely confidential. Moreover, if confidentiality is important, dispute resolution by arbitration can, in and of itself, offer a big potential advantage over litigation since no public record of the filing of a petition for arbitration exists. Contrast this with a lawsuit in which, even if a subsequent confidential settlement is reached by the parties, the existence of the lawsuit, allegations of wrongdoing and potentially sensitive facts that are contained in pleadings filed with the court in that lawsuit are a matter of public record.

3. Concerns about the arbitrator "splitting the baby". A frequent gripe of arbitration veterans, including many business litigators, is that arbitrators often reach a mealy-mouthed, middle-of-the-road conclusion and make a corresponding award which totally ignores the facts of the dispute and the law. This outcome can be avoided by drafting the arbitration clause to state that the arbitrator must resolve the dispute based upon the law (and not vague notions of "just cause" and the like), and that the award must include a written statement of the factual and legal bases on which the award was made. As an added precaution, the provision can also provide a right to appellate arbitration applying the same standards of review that would govern a civil appeal.

(continued on page 8)

Making the Most of Your Insurance

Insurance is often described as "swiss cheese", meaning there seems to be a lot of holes where the coverage should be. Further, while your insurer is a stickler about you paying your premium on time, it can seem interminably slow in deciding whether, and if so, when to pay your claim. This article is written for business owners and provides some insights gained from our time dealing with insurers on behalf of our business clients.

Choose an Agent With Extensive Experience Insuring Your Industry.

20 years ago, we helped some good friends start their manufacturing business from scratch. At that time they hired an insurance agent to help them with insurance. Without knowing, they quickly outgrew his knowledge and expertise. Later, after an expensive loss they came to realize that their agent had woefully underinsured them, primarily because he lacked an understanding of their industry. They have since retained an agent who represents many other manufacturing clients. The new agent was able to better coverage.

If you think you have a claim (or as your policy might define it, a "loss, claim, suit or occurrence"), let your lawyer and your insurance agent know.

Almost all insurance policies require that you notify the insurer "as soon as reasonably practicable". If you have been served with a lawsuit, you will want to provide the summons and complaint to your insurer immediately, and ask the insurer to provide you with a defense. In the interim, you may need to hire a lawyer to protect you but your right to reimbursement will apply back to the first day you notified your insurer. Many times a business owner is not surprised when he/she receives the lawsuit. Often, the lawsuit is simply the latest escalation of an ongoing conflict. In this situation, the business owner may have been obligated to notify the insurer much earlier than upon receipt of the lawsuit. And, failure to provide notice of the earlier "occurrence" might give your insurer a way to avoid providing you with a defense to the later lawsuit. While not automatic, your insurer may be able to avoid defending you if you did not provide prompt notice and if the insurer can prove that it suffered "substantial prejudice" by your delay. For this reason, it is recommended that you communicate with your lawyer when you first sense a conflict is brewing. Your lawyer should be able to advise you on whether you have suffered an "occurrence" which necessitates that you notify your insurer.

Understand Your Insurer's "Reservation of Rights".

When you submit an insurance claim, your insurer has 3 choices: it can accept the claim and defend you; it can reject your claim (in which case you may be on your own); or it can accept your claim with a "reservation of rights". Under a reservation of rights, your insurer will initially provide you with a defense but reserves the right to come back after you for all the fees and costs it incurred in doing so. This may occur because some of the claims in a lawsuit against your business are covered (such as negligence) while others are not (breach of contract). No matter the reason, if your insurer elects to cover your claim under a reservation of rights, it is required to also pay for you to have "Cumis" counsel. Cumis counsel is a law firm you pick (it can be our firm or any other firm) who protects your interests while the fight continues. Effective Cumis counsel can prevent costly claims against you later.

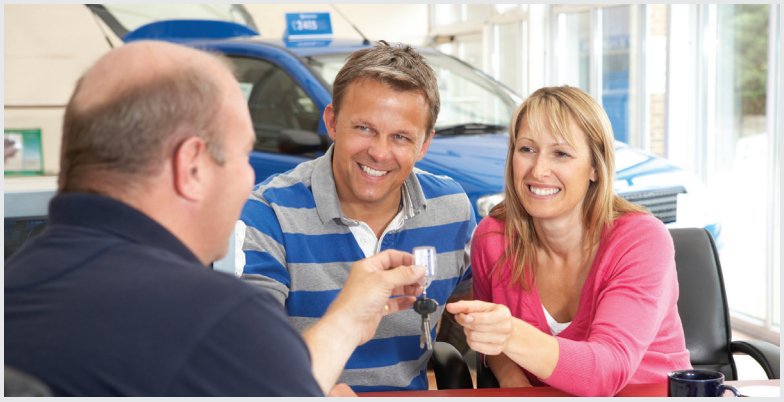
Better Safe Than Sorry.

These are just a few areas where a business owner should be wary about how to interact with their insurer. Our advice is to call or email us as soon as you become aware of a potential claim or occurrence. We'll help you decide whether or not you need to notify your insurer, and we can also help you strategize about how to best deal with the potential claimant.

Please contact Alton Burkhalter at (949) 975-7500 or at aburkhalter@bkcglaw.com if you have questions about any issue discussed in this article.

Used Vehicle Sold "As Is" Not Protected by Implied Warranties of Merchantability and Fitness

A positive new "Lemon Law" case for our vehicle dealer clients came down from the Third Appellate District in May. In *Leber v. DKD of Davis, Inc. (2015) 237 Cal.App.4th 402*, the plaintiff tried to sue a dealer that sold her a used Silverado truck. She complained the truck had a defective transmission and she brought a claim against the dealer under the Song-Beverly Consumer Warranty Act (a portion of which is known as the Lemon Law). The Court found the plaintiff had no claim as the dealer disclosed in the Buyer's Guide that the truck was sold "As Is" and with "no warranty."



The Court found that the implied warranties of merchantability and fitness generally covering "consumer goods" under the Song-Beverly Consumer Warranty Act did not trigger protection for used vehicles, even when, as in this case, the manufacturer's warranty on the truck had not expired.

The Court concluded "as between seller and buyer in this sale the seller, DKD, undertook no liability [as a result of the remaining manufacturer's warranty] but, as described above, explicitly and clearly negated it." *237 Cal.App.4th at 402*. The Court noted, if anything, the plaintiff would only have a potential claim against the manufacturer. In a consumer friendly state such as California, it is heartening to see a well-reasoned opinion like the one in *Leber* offer support for our dealer clients.

Please contact Ros Lockwood at (949) 975-7500 or at rlockwood@bkcglaw.com if you have questions about this article.

Honors and Awards

Dan Kessler was awarded the Preeminent AV™ rating (5.0 out of 5.0) by Martindale-Hubbell.

Alton Burkhalter, also rated Preeminent AV™ by Martindale - Hubbell, received the Client Distinction Award.

The Ratings Explanation

Martindale-Hubbell® Peer Review Ratings™ reflect a combination of achieving a Very High General Ethical Standards rating and a Legal Ability numerical rating. A threshold number of responses is required to achieve a rating.

The General Ethical Standards rating denotes adherence to professional standards of conduct and ethics, reliability, diligence and other criteria relevant to the discharge of professional responsibilities. Those lawyers who meet the "Very High" criteria of General Ethical Standards can proceed to the next step in the ratings process - Legal Ability.

Legal Ability ratings are based on performance in five key areas, rated on a scale of 1 to 5 (with 1 being the lowest and 5 being the highest).

These areas are:

Legal Knowledge - Lawyer's familiarity with the laws governing his/her specific area of practice(s)

Analytical Capabilities - Lawyer's creativity in analyzing legal issues and applying technical knowledge

Judgment - Lawyer's demonstration of the salient factors that drive the outcome of a given case or issue.

Communication Ability - Lawyer's capability to communicate persuasively and credibly

Legal Experience - Lawyer's degree of experience in his/her specific area of practice(s)

The numeric ratings range may coincide with the appropriate Certification Mark:

AV Preeminent® (4.5-5.0) - AV Preeminent® is a significant rating accomplishment - a testament to the fact that a lawyer's peers rank him or her at the highest level of professional excellence.

BV Distinguished® (3.0-4.4) - BV Distinguished® is an excellent rating for a lawyer with some experience. A widely respected mark of achievement, it differentiates a lawyer from his or her competition.

I PAY MY EMPLOYEES A GENEROUS SALARY, SO I DON'T HAVE TO WORRY ABOUT TRACKING THEIR HOURS OR PAYING OVERTIME, RIGHT?

One of the most commonly held misconceptions by California employers is that they need not track their employees' time nor pay overtime if they compensate their employees by salary, as opposed to pay them hourly. These employers believe that the form in which they pay their employees' compensation, i.e., salary versus hourly, solely dictates whether those employees are entitled to overtime if they work more than 40 hours per week or 8 hours per day. As such, many of these misinformed employers fail to accurately track their salaried employees' time, mistakenly believing that monitoring their hours is unnecessary.

Employers who hold these mistaken beliefs are not only wrong, but they potentially subject themselves to substantial liability from their employees for unpaid overtime, as well as penalties, interest and attorney's fees. Contrary to many employers' mistaken belief that paying overtime is not necessary for employees who receive a salary, an employee's right to overtime under California law depends on several factors, only one of which relates to whether the employee receives a salary.

To determine if an employee is legally entitled to overtime, the employer must ascertain whether the employee is exempt or non-exempt. Employers must pay non-exempt employees overtime compensation, at a rate at least 150% of the employee's normal rate of pay, if she works more than forty hours per week or more than eight hours per day. On the other hand, employers are not required to pay overtime compensation to exempt employees. Of course, the critical becomes which employees are exempt and which are non-exempt?

Answering that question requires a technical analysis of both the legal requirements for various exemptions, as well as the employee's specific duties, responsibilities, qualifications, total amount of annual compensation, and the form of compensation, i.e., hourly versus salary. Thus, while the form of compensation (hourly versus salary) constitutes one of the factors that determine whether an employee is entitled to overtime compensation, it is but one of several.

Many employers in California face substantial liability from their employees for misclassifying them as exempt and failing to pay overtime when required.

Please contact Josh Waldman at (949) 975-7500 or jwaldman@bkcglaw.com if you have questions about any issue discussed in this article.

ZERO PROOF WHISKEY: JUDGE BOUNCES CLAIMS OF EMPLOYEE FIRED FOR IMPROPER JIM BEAM REFUND

BKCG Scores Big Win Before Trial to End Case

(continued from page 1)

Ralphs retained seasoned BKCG trial counsel, Daniel J. Kessler, to defend the case. Along with senior associate, Ros Lockwood, Kessler set out to marshal the evidence. Lockwood extracted key admissions from Vincent during multiple days of videotaped depositions that ultimately proved to be fatal to Vincent's case.

BKCG filed a motion asking the Court to render a complete judgment in favor of Ralphs based on the undisputed material evidence in the case. Among other rulings, Superior Court Judge Robert A. Dukes found there was no dispute that Vincent knew of the Ralphs policies at issue, knew that violation of the policies could result in immediate termination, and that Vincent admitted she violated the policies. Citing frequently to her deposition testimony, the Court also found that Vincent just did not have any competent evidence to overcome this proof to establish her claims. The Court noted repeatedly that Vincent's claims were merely based on her own suspicions and opinions, and thus were not sufficient to carry her case.

Throughout the litigation, Vincent claimed her damages exceeded $3.5MM. In fact, just one week before the Judge ruled against her, Vincent demanded settlement of no less than $825,000.

Asked for comment, BKCG litigation head Dan Kessler stated, "It is never easy to obtain a complete summary judgment in employment cases because they are so fact intensive. In this case, however, due credit goes to Judge Dukes. He clearly read the papers closely and properly applied the legal standards. A ruling like this sends a message to plaintiffs who hope to extract money from employers armed with little more than outrageous allegations and baseless hunches." Kessler added, "We are very pleased for our client. This saves a lot of resources on a matter that we felt never belonged in court to begin with."

Please contact Daniel Kessler at (949) 975-7500 or dkessler@bkcglaw.com if you have questions about this article, or any other aspect of employment law.

WHAT YOU NEVER THOUGHT TO ASK ABOUT ARBITRATION CLAUSES MAY COME BACK TO BITE YOU

(continued from page 5)

4. Number of arbitrators. One of the potential disadvantages of arbitration is that, unlike in a lawsuit, the arbitrator, who is acting as a private judge, is on the clock at a billing rate that can range anywhere from $400-1,000/hour. Most dispute resolution services will use a single neutral arbitrator as a default, if the arbitration provision is silent on the issue. However, this author has been presented with, and has revised, proposed arbitration clauses from deep-pocketed parties' lawyers calling for a panel of three arbitrators, which could make it astronomically (and prohibitively) expensive to resolve the underlying dispute.

5. Timing and duration of arbitration hearing. If a dispute must be resolved quickly, the arbitration clause can specify a short deadline for the hearing to be conducted after a party makes a demand for arbitration and also specify a maximum duration for the arbitration hearing itself. In addition, on a related note, the parties have broad latitude to agree on what the permitted scope of discovery will be prior to the hearing: everything from full-blown discovery rights, as in a civil case, to the discovery provided in the applicable arbitration rules to, as a middle ground, the latter plus a specified maximum number of hours of depositions.

While the foregoing is not intended to be an exhaustive list of all the matters that can be covered in an arbitration clause, it will hopefully illustrate the point that there should really be no such thing as a "one size fits all" contractual arbitration clause. With some forethought, and advance consultation with the author, as your BKCG transactional attorney, as well as Alton Burkhalter and Dan Kessler, our highly-experienced litigation partners, it is possible to go a long way to ensure that your are protected as much as possible if your transaction ends in a dispute that must be arbitrated.

Please contact Gregory Clement at (949) 975-7586 or at gclement@bkcglaw.com if you have questions about this article, or any other transactional business matter.

The BKCG Bulletin is Published By:

Burkhalter Kessler Clement & George LLP

2020 Main Street
Suite 600
Irvine, CA 92614
Attn: Alton G. Burkhalter
949.975.7500
949.975.7501 fax
www.bkcglaw.com

340 North Westlake Blvd.
Suite 110
Westlake Village, CA 91362
Attn: William C. George
805.373.1500
805.373.1503 fax

BKCG

Visit our new web site at www.bkcglaw.com

Be sure to visit us on LinkedIn

Burkhalter Kessler Clement & George LLP (BKCG) advises and protects businesses and high net worth individuals through experienced litigation and transactional lawyers. Core practice areas include: Business litigation in state and federal courts, as well as FINRA, AAA and JAMS arbitration and mediation; Corporate, transactional and employment law documentation; and Estate Planning and Probate services through the Firm's State Bar certified Estate Planning Specialist.